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NO. 97325-3

SUPREME COURT  
OF THE STATE OF WASHINGTON

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KIMBERLY J. GERLACH, individually,

Petitioner,

v.

THE COVE APARTMENTS LLC, a Washington Corporation;  
And WEIDNER PROPERTY MANAGEMENT LLC,  
a Washington corporation,

Respondents.

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**BRIEF OF AMICUS CURIAE  
WASHINGTON COUNTIES RISK POOL**

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

This Brief is submitted by the Washington Counties Risk Pool (WCRP), which is one of the largest Risk Pools in the State of Washington. WCRP is a joint self-insurance program authorized under RCW 48.62 and RCW 39.34 in which 26 member counties had joined together to jointly self-insurance, jointly purchase re-insurance or excess insurance for liability and property risks and jointly contract or hire personnel to provide risk management, claims and administrative services.

WCRP as an entity providing liability and risk management services for 26 counties throughout the State of Washington has an interest in defending its members in cases brought on highway and road design cases throughout the State of Washington. As part of the defense of these types of cases, the intoxication defense under RCW 5.40.060 is applicable to some cases involving negligent road design within the State of Washington. WCRP has an interest in application of the intoxication defense, which may be utilized by its Member County in defense of negligence cases.

## **II. STATEMENT OF THE CASE**

Amicus accepts the statement of the case provided by the Respondent in its Answer to the Petition for Review and Supplemental Brief.

### III. ARGUMENT AND AUTHORITY

The Trial Court erred by excluding two (2) pieces of evidence Cove Apartments sought to admit to establish approximate cause under RCW 5.40.060(1). As the Court of Appeals correctly noted, evidence of Ms. Gerlach's BAC and testimony from an expert witness related to what alcohol level affected individuals was relevant for the jury's determination of proximate cause.

RCW 5.40.060(1) states:

[I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of injury or death and the trier of fact finds that such person to have been more than fifty percent at fault.

RCW 5.40.060(1) requires the party asserting the intoxication defense to establish two (2) elements:

1. The other was party intoxicated; and
2. The intoxication was the proximate cause of injury.

Proximate cause entails two (2) elements, cause in fact and legal cause. Christen v. Lee, 113 Wn.2d 479, 507 (1989). "Cause in fact refers to 'but for' consequences of an axiom: it is the physical connection between the act and the injury." *Id.* Legal causation element of proximate

cause involves policy considerations of how far the consequences of a defendant's action be extended. *Id.* At 508. Washington recognizes that there may be more than one (1) proximate cause of an injury. See Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 676 (1985). Issues of proximate cause are generally reserved for the jury.

The exclusion of the blood alcohol level was in error. The anticipated testimony from Cove Apartments was Ms. Gerlach's blood alcohol level was approximately .238 at the time of her injury. "The trial court determined that if Gerlach admitted she was intoxicated, evidence of her blood alcohol level was not necessary to establish a defense under RCW 5.40.060(1)." Gerlach v. Cove Apartments, 8 Wn.App.2d 813, 820 (2019).

The Superior Court's reasoning in this matter was in error as evidence of the blood alcohol level was relevant for both elements of the intoxication defense. One, it established that Ms. Gerlach was intoxicated and two, the level of her intoxication was necessary for the Defendant to establish that the intoxication was the proximate cause of her injuries. Ms. Gerlach's admission that she was intoxicated, is insufficient to allow the Defendant Cove Apartments to argue proximate cause under the intoxication defense.

The admissions by Ms. Gerlach did not quantify the level of intoxication for the jury to consider. The Plaintiff's admission to her intoxication was a statement that did not provide the jury with her level of intoxication. The jury was left to speculate whether she had 1 alcoholic drink, 5 alcohol drinks or 10 or more alcoholic drinks. The trial court excluded all the Defendant's evidence that would have provided the jury with the Plaintiff's level of intoxication, and how her level of intoxication affected her actions. In essence, it stripped away the jury's ability to properly analyze how the alcohol ingestion affected her physically and resulted in the fall and subsequent injuries.

It is disingenuous for the Plaintiff to assert that the level of intoxication should be excluded. When compared to a criminal case, the prosecutor is required to prove that a driver's intoxication affects his or her ability to drive when the driver's BAC is below the per se limit of .08. WPIC 92.02. However, the prosecutor's burden to establish causation is relieved when the driver's BAC is above the per se limit of .08. *Id.* Here, the Plaintiff's BAC of approximately .24 is nearly three (3) times the per se limit and relevant to establish Plaintiff's intoxication caused her injuries.

The jury was asked what was the proximate cause of the injury, to determine between the Plaintiff's intoxication or the actions of the

Defendant. To what extent each party was negligent, the jury was required to determine percentage of fault of each party. In this case, the trial court's exclusion of this evidence precluded the jury from understanding the full nature and extent of Ms. Gerlach's intoxication and how that intoxication proximately caused her injuries. The jury could not properly determine the Plaintiff's percentage of fault in this matter as the trial court excluded all evidence as to how the Plaintiff's level of intoxication caused her injuries. Given that the Plaintiff's BAC was approximately three (3) times the legal limit to drive in the State of Washington, the level of the Plaintiff's intoxication, as well as how that level of intoxication affected her abilities was a relevant factor for the jury to consider in determining the percentages of fault in this matter.

The trial court's exclusion under ER 403 also was not supported by the evidence and the Court of Appeals correctly reasoned that the Superior Court erred in excluding evidence of the BAC under ER 403.

ER 403 states:

Also relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

“When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” Salas v.



High-Tech Erectors, 168 Wn.2d 664, 671 (2010). However, when evidence is undeniably probative of the central issue in a case, the ability of the danger of unfair prejudice to substantially outweigh the probative value of the evidence is “quite slim”. Sisley v. Seattle Sch. Dist. No. 1, 171 Wn.App. 227, 232 (2012). Since the level and extent of the Plaintiff’s intoxication is relevant for the jury to determine whether or not her actions were the proximate cause of her own injuries, the level and extent of her intoxication should not have been excluded under ER 403 and the Court of Appeals correctly determined that ER 403 did not preclude this evidence.

As the Court of Appeals recognized, evidence of Ms. Gerlach’s BAC was relevant to establish “the extent to which her intoxication proximately caused her injuries.” Gerlach, 8 Wn.App.2d at 821. It is clear that the Defendant Cove Apartments was prepared to offer expert testimony to assist the trier of fact in understanding the BAC level. Dr. Vincenzia was offered as an expert witness to testify to the effect of consumption of alcohol in a person on his or her blood alcohol level. The evidence of Ms. Gerlach’s BAC along with the anticipated testimony of Dr. Vincenzia was relevant evidence to establish the extent of the proximate cause of Ms. Gerlach’s injuries. The probative value prong under ER 403 substantially outweighs its prejudicial effect on the Plaintiff. Since the percentage of fault was reserved for the jury’s consideration, the

jury should have been able to consider Ms. Gerlach's level of intoxication and how it affected her physical and cognitive abilities. See Geschwind v. Flanagan, 121 Wn.2d 833, 837-38 (1993). The Superior Court improperly prohibited Cove Apartments from submitting relevant evidence to the jury which would have established that Ms. Gerlach's intoxication was the proximate cause of her injuries as they are required to do under RCW 5.40.060(1).

Contrary to the Superior Court and the Plaintiff's arguments on appeal, evidence of Ms. Gerlach's admission to being intoxicated is insufficient to allow the Defendant to argue proximate cause. Since RCW 5.40.060(1) requires that the Defendant in this case establish that the Plaintiff's injuries were caused by the Plaintiff's intoxication. Exclusion of evidence that would have enabled the Defendant to establish proximate cause was prejudicial and as the Court of Appeals decided, a new trial where all relevant evidence is considered by the jury is necessary.

#### **IV. CONCLUSION**

The Court of Appeals correctly reversed the Superior Court ruling prohibiting the admission of relevant evidence, and this Court should affirm the Court of Appeals decision and allow the case to proceed to a jury to consider all the evidence in connection with the intoxication defense under RCW 5.40.060(1).

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of January, 2020.

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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